

Court of Appeals, State of Michigan

ORDER

Michele Kossack v Board of Directors for Avalon Pointe
Condominium Association

Docket No. 295797

LC No. 09-007373-CZ

William B. Murphy
Chief Judge

Jane E. Markey

Douglas B. Shapiro
Judges

Pursuant to MCR 7.205(D)(2), in lieu of granting the application for leave to appeal, the Court VACATES the circuit court's November 20, 2009, order and REMANDS with direction that the circuit court enter an order granting plaintiffs' motion to strike defendants' notice of nonparty fault. The trial court correctly found that pursuant to *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 323-324; 661 NW2d 248 (2003), MCR 2.112(K) and related statutes do apply to plaintiffs' tort-based breach of fiduciary claim (see *Miller v Magline, Inc*, 76 Mich App 284, 313; 256 NW2d 761 (1977)). However, the court failed to completely analyze *Holton* wherein we concluded that the trial court correctly granted the plaintiffs' motion to strike. The analogy between the circumstances in *Holton* and those in the present case is precise and requires a similar result. Just as the fire in the *Holton* case was "merely the underlying basis of the insurance claim against defendants," the embezzlement in the present case, is "merely the underlying basis of the [breach of fiduciary duty] claim against defendants." And, as in *Holton*, where the "plaintiffs' claim is that their damages occurred because of inadequate insurance coverage, not because of the home fire," in the present case, plaintiffs' claim is that their damages occurred not because of the embezzlement by the association employee, but rather because of the failure of defendants to comply with the provision in the association bylaws stating that they must require that association employees responsible for handling association funds "furnish adequate fidelity bonds."

We do not retain jurisdiction.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUN 09 2010
Date

Sandra Schultz Mengel
Chief Clerk